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Supreme Court, U.S.
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No. 00-1877

IN THE

Supreme Court of the United States

ANTONIO S. CONTRERAS,

Petitioner,

v.

SUNCAST CORPORATION, an Illinois Corporation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Suncast Corporation, is an Illinois corporation and has no parent or subsidiary corporation. No publicly held company owns 10% or more of the stock of Suncast.

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STATEMENT OF THE CASE

This is a routine Title VII and Americans With Disabilities Act ("ADA") case wherein the plaintiff failed to present any evidence supporting his discrimination claims and accordingly the district court granted defendant summary judgment and the Seventh Circuit affirmed. Unhappy with the results, plaintiff seeks to petition this Court for Certiorari, raising new arguments not asserted below and misstating the rulings of both the district court and the Seventh Circuit.

A. Statement of Facts

Plaintiff, Antonio Contreras ("Contreras"), a Mexican-American, worked for defendant, Suncast Corporation ("Suncast"), as a forklift operator from November of 1994 until he was terminated for repeated violations of Suncast's work rules on February 13, 1996. The day following his termination, at the behest of Contreras' union, Suncast offered to reinstate Contreras. Contreras, however, advised Suncast that he was not interested in returning to work, but wished to pursue legal action instead. (Pet. App. 2a-4a).

Suncast is a manufacturer and distributor of lawn and garden equipment. During Contreras' employment with Suncast, Thomas Tisbo was Suncast's president, Michael Hamilton was the vice-president, John Baunach was the manager of human resources, and Randall Guillotte was a production flow supervisor responsible for supervising Contreras. (Pet. App. 2a).

On June 21, 1995, Contreras injured his back in a forklift accident at work and as a result of his injuries, was instructed by his physician not to drive a forklift for more than four

hours a day and to spend the remainder of the day on light duty work. Suncast complied with these restrictions though Contreras argues that Suncast's accommodations were inadequate. (Pet. App. 3a, 33a). On December 18, 1995, Contreras injured his head on a metal rack after hearing Guillotte call out his name. (Pet. App. 3a, 33a).

During Contreras' short employment with Suncast, Contreras amassed a horrendous disciplinary record and received numerous warnings regarding his repeated violations of Suncast's work rules. Contreras' disciplinary problems began on July 20, 1995, when he was given a verbal warning for violating the forklift safety rules. The next day, Contreras was given a written warning for failing to follow safety procedures. (Pet. App. 3a, 33a).

On November 7, 1995, Guillotte observed Contreras and two co-workers violating forklift safety rules. Guillotte met with the three as a group and gave each of them a copy of the forklift safety rules. As Guillotte walked away from the meeting, Guillotte heard Contreras say "Chingado," from which he understood Contreras was calling him a "motherfucker." Guillotte gave Contreras a warning for insubordination. Contreras maintains that he actually said "vamanos a la chingada," which Contreras says means "let's get the hell out of here." (Pet. App. 3a, 34a).

In addition, Contreras was disciplined repeatedly for violating Suncast's attendance policies. Between January 3, 1996 and February 8, 1996, Contreras violated Suncast's attendance policies on seven different occasions. In fact, Contreras was caught falsifying a Suncast time card in an attempt to cover up one of these violations and was suspended. (Pet. App. 3a, 34a).

On February 12, 1996, Contreras violated Suncast's attendance policy for the eighth time in a little over one month by reporting to work tardy and for failing to call in one hour prior to his start time to advise Suncast that he would be late. Suncast discharged Contreras on February 13, 1996 due to his repeated violations of Suncast's work rules in accordance with Suncast's progressive discipline policy. Although Suncast offered to unconditionally reinstate Contreras the next day, Contreras rejected this offer and instituted the instant lawsuit. (Pet. App. 4a, 34a, 39a-40a).

B. The District Court Decision

Contreras sued alleging that: (1) Suncast terminated him based on his national origin and also failed to give him light duty work in violation of Title VII of the Civil Rights Act of 1964; (2) Suncast retaliated against him in violation of Title VII by discharging him after he filed an EEOC charge; (3) Suncast failed to reasonably accommodate him following his injury and discriminated against him for requesting accommodations in violation of the Americans With Disabilities Act; (4) Guillotte had assaulted him by intentionally causing him to bang his head on the metal rack on December 18, 1995; (5) Suncast was negligent in supervising Guillotte and directed Guillotte to stalk and assault Contreras; and (6) Suncast wrongfully discharged him because he filed a workers compensation claim. (Pet. App. 4a, 34a).

On March 15, 2002, the Honorable Ann C. Williams of the United States District Court for the Northern District of Illinois, granted summary judgment in favor of Suncast on all federal claims and dismissed the state law claims without prejudice. (Pet. App. 4a). With respect to Contreras' national origin discharge claim, the district court concluded that

Contreras could not establish a *prima facie* case of national origin discrimination because he was not meeting Suncast's legitimate expectations and because Contreras could not show that similarly situated non-Hispanic employees received more favorable treatment. (Pet. App. 38a-42a). The district court noted:

> Contreras' pattern of conduct demonstrates that no reasonable fact finder could conclude that he was meeting the legitimate expectations of his employer. Although Contreras contends that such violations were "trivial," the court finds otherwise. Suncast could have fired plaintiff on a number of occasions for insubordination, falsification of records, and repeated tardiness. These violations were not trivial. On the contrary, this kind of employee behavior is not only unproductive, it negatively affects the entire workplace if left unchecked. In light of this conduct, Contreras has failed to establish a prima facie case for national origin discrimination. (Pet. App. 40a).

With respect to Contreras' national origin in job assignments claim, the district court found that Contreras could not meet his *prima facie* case because he failed to show that Suncast treated any similarly situated non-Hispanic employee more favorably. (Pet. App. 42a-43a).

The district court granted Suncast summary judgment on Contreras' failure to accommodate claim under the ADA, finding that Contreras was not a qualified person with a disability. First, the district court found that Contreras failed to establish that he was substantially limited in the major life activity of working by virtue of his inability to lift in

excess of forty-five pounds for long periods of time, his inability to engage in strenuous work and his inability to drive a forklift for more than four hours per day. (Pet. App. 44a). In addition, the district court found that although Contreras may have initially shown that he was substantially limited in the major life activity of sexual relations, he failed to establish that Suncast had knowledge of this alleged disability. (Pet. App. 46a). In any event, the district court found that Contreras was not qualified to perform the essential functions of his job, with or without accommodation, because he admits he was not capable of operating a forklift for his entire eight hour shift. (Pet. App. 50a).

The district court further granted summary judgment in favor of Suncast on Contreras' Title VII and ADA retaliatory discharge claim finding that Contreras failed to establish a causal connection between his termination and his filing of an EEOC charge. (Pet. App. 48a). Having dismissed all of Contreras' federal claims, the district court declined to exercise supplemental jurisdiction over the state claims, and accordingly dismissed the state claims without prejudice.[1] (Pet. App. 48a).

The district court also denied Contreras' cross-motion for summary judgment wherein Contreras argued that Suncast's accommodation policy [2] is a *per se* violation of

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1. Contreras subsequently refiled the state law claims in federal court, asserting diversity jurisdiction pursuant to 28 U.S.C. § 1332. (Pet. App. 4a).

2. Contreras misstates Suncast's accommodation policy by asserting that Suncast only accommodated employees with short-term, work-related injuries. (Pet. 7). This is not Suncast's policy and Contreras' assertion to the contrary distorts the record.

the ADA. The district court held that Contreras lacked standing to challenge Suncast's accommodations policy because he was not a qualified person with a disability under the ADA. As such, Contreras did not have an injury-in-fact.[3]

The case was reassigned to district court Judge Suzanne B. Conlon following Judge Williams' appointment to the United States Court of Appeals for the Seventh Circuit. (Pet. App. 56a). On May 22, 2000, Judge Conlon partially granted Suncast's bill of costs. (Pet. App. 26a-31a).

C. The Seventh Circuit Decision

On January 3, 2001, The Seventh Circuit affirmed Judge Williams grant of summary judgment in all respects and upheld Judge Conlon's award of costs. With respect to Contreras' Title VII discriminatory discharge and discriminatory job assignment claims, the Seventh Circuit easily concluded that Contreras was not meeting Suncast's legitimate expectations and therefore failed to make a *prima facie* case:

> Though we recognize that coming to work, not falsifying documents, and not being insubordinate, are usually implicit expectations that an employer has for his or her employees, by putting these requirements in Suncast's Work

3. The district court further rejected Contreras' claim that certain of the affidavits submitted by defendants were facially defective because they were notarized by Baunach, a party to the litigation. The court noted that defendants had cured the allegedly defective affidavits by filing a motion to substitute the affidavits with identical affidavits properly notarized by a disinterested party. (Pet. Aff. 50a-51a).

> Rules, there can be no claim that these were not legitimate expectations of the company . . . The uncontroverted evidence is that Contreras did not meet those bona fide expectations. Contreras was repeatedly cited for operating his forklift in an unsafe manner. Furthermore, within less than six weeks, Contreras violated the company's work attendance guidelines on no less than eight occasions. On one such occasion, Contreras doctored the company records in an attempt to conceal his infraction. Finally, the "chingado incident," as Contreras refers to it, shows a level of insubordination that in itself was worthy of dismissal. (Pet. App. 8a-10a).

The Seventh Circuit also rejected Contreras' ADA claims, finding that he was not substantially limited in the major life activity of working, noting that Contreras has not presented any evidence "that even hints at the notion that he is precluded from a broad class of jobs." (Pet. App. 13 a). While the Seventh Circuit acknowledged that reproduction is and engaging in sexual relations may be a major life activity for purposes of the ADA, the Seventh Circuit concluded that Contreras "has not produced even a scintilla of evidence that he is significantly restricted as to the condition, manner or duration under which he can reproduce as compared to the average person in the general population." (Pet. App. 17a). Further, Contreras failed to substantiate his claim of sexual difficulties with any documentation or testimony beyond a general assertion that the frequency with which he has relations has decreased. (Pet. App. 17a).

The Seventh Circuit further agreed with the district court's analysis of Contreras' Title VII and ADA retaliation

claims, finding that the mere temporal proximity of Contreras' EEOC charge with the termination was insufficient to survive summary judgment. The appellate court concluded that Contreras was terminated after a series of unexcused absences and acts of insubordination and that there was no evidence to support that Contreras' filing of his EEOC charge had anything to do with the decision to discharge him. (Pet. App. 19a).

The Seventh Circuit also agreed with the district court that Contreras lacked standing to challenge Suncast's accommodations policy as a *per se* violation of the ADA because he was not a "qualified" person with a disability, in that he was not able to perform the essential functions of the job with reasonable accommodations. Because he was not a qualified person with a disability, the Seventh Circuit concluded that he was not the type of individual protected by the relevant portions of the ADA. (Pet. App. 20a).

On appeal, Contreras raised three additional arguments which the Seventh Circuit found "unconvincing" and disposed of "without much deliberation." (Pet. App. 21a). First, the Seventh Circuit found no error in the district court's decision to permit defendants to substitute the affidavits notarized by Baunach with affidavits notarized by a disinterested party. (Pet. App. 21a). Second, the Seventh Circuit upheld the district court's decision to relinquish pendent jurisdiction over the state law claims was within the proper discretion of the district court and was the "norm, not the exception." Finally, the Seventh Circuit rejected Contreras' contention that Judge Conlon did not have authority to award costs after the case was reassigned to her following Judge Williams' elevation to the Seventh Circuit. (Pet. App. 22a).

On February 13, 2001, the Seventh Circuit denied Contreras' Petition for Rehearing and Petition for Rehearing *En Banc*.

REASONS FOR DENYING THE WRIT

A. Contreras Incorrectly Asserts That All of His Federal Claims Were Decided On Article III Standing Grounds

Contreras incorrectly argues that "all" of his federal claims were dismissed on the grounds that he did not have Article III standing. (Pet. 8). While Contreras asserts this argument for the first time before this Court, Contreras' argument completely misstates the basis of the lower court decisions.

Neither the district court nor the Seventh Circuit ruled that Contreras did not have standing to assert his Title VII or ADA discrimination claims. To the contrary, the lower courts did not even question whether Contreras had standing to raise these claims, but proceeded to reject his claims because he failed to come forward with any evidence to prove them. With respect to the Title VII claim, the lower courts found that Contreras could not sustain a *prima facie* case because he could not establish that he was meeting his employer's legitimate expectations. (Pet. App. 10a, 40a). With respect to his ADA claims, the lower courts found that Contreras was not a qualified person with a disability, and even if he was, Suncast had no knowledge of his alleged disability. (Pet. App. 20a, 46a). Finally, with respect to his Title VII and ADA retaliation claims, the lower courts found that Contreras failed to come forward with any evidence linking the filing of his EEOC charge with any adverse employment action. (Pet. App. 18a, 47a).

Contreras improperly suggests that the Supreme Court should "resolve the issue of whether an employee who is not disabled can assert an ADA retaliation claim." (Pet. 17). This issue, however, is not at issue in this case.[4] Rather, Contreras asserted that he was disabled and that he was retaliated against because he requested ADA accommodations and filed an EEOC charge. Contrary to Contreras' suggestion, the Seventh Circuit did not decide Contreras' ADA retaliation claim on the grounds that he was not disabled and therefore lacked standing, but rather, concluded that Contreras had failed to come forward with any evidence showing a causal connection between his request for ADA accommodations or his EEOC charge and his termination.

B. The Seventh Circuit Properly Held that Contreras Did Not Have Standing to Challenge Suncast's Accommodations Policy As *Per Se* Violative of the ADA

The only claim where standing played any part in the lower courts' decision was with respect to Contreras' cross-motion for summary judgment where he argued that Suncast's accommodation policy was a *per se* violation of the ADA. It was with respect to this claim that the lower courts properly concluded that Contreras did not have standing because he was not a qualified person with a disability. (Pet. App. 19a, 49a).

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4. While this issue is not raised in this case, there appears to be no reason that this Court need address whether a non-disabled individual can assert a claim for ADA retaliation. The language of 42 U.S.C. § 12203 makes clear that the prohibition against retaliation applies to "any individual."

Contreras incorrectly suggests that there is a split in the circuits as to whether a non-disabled employee has standing to challenge an employer's accommodations policy as being a *per se* violation of the ADA. No such split exists.

Under well-settled law, in order to have standing under Article III to challenge Suncast's policy, Contreras must show: (1) injury in fact; one that is concrete and particularized and actual or imminent (not conjectural or hypothetical); (2) a causal relationship between the injury and the challenged conduct (i.e. the injury has to be fairly traceable to the challenged action); and (3) a likelihood that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The Seventh Circuit held in the decision below that because Contreras was not a qualified person with a disability, he lacked standing to assert the accommodations policy of Suncast as being a *per se* violation of the ADA. (Pet. App. 20a). According to the Seventh Circuit:

> We agree with the district court's interpretation that Contreras does not have standing to challenge Suncast's accommodations policy, in that he is not a qualified person with a disability, the type of individual protected by the *relevant portions* of the ADA . . . Contreras' impairment did not bring him within the gamut of those who could challenge the legality of Suncast's accommodations policy, and the fact that he is no longer employed by the company means that there is no risk that he will ever suffer an injury as a result of this policy. (Emphasis added).

(Pet. App. 20a).

None of the cases cited by Contreras reveal any conflict with the instant Seventh Circuit's decision or any conflict within the Circuits. Indeed, none of the cases cited by Contreras involve whether a non-disabled individual had standing to assert a per se violation of an employer's *accommodations* policy. Contreras relies heavily upon the Tenth Circuit's decisions of *Griffin v. Steeltek*, 160 F.3d 591 (10th Cir. 1998) and *Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221 (10th Cir. 1997). These decisions, however, actually support the decision of the Seventh Circuit in this case.

In *Griffin*, a nondisabled job applicant brought an action alleging that the employer violated the provisions of the ADA prohibiting employers from making disability-related inquiries of employees, unless the inquiry is job-related or consistent with business necessity. 42 U.S.C.§ 12112(d)(2). The Tenth Circuit held that the job applicant did not lack standing merely because he was not disabled under the ADA. In so holding, the Tenth Circuit explicitly noted that the provision at issue applies to "all employees," and is "unlike suits based on a failure to provide a reasonable accommodation" which is limited to qualified individuals with a disability. 160 F.3d. at 594. Unlike the plaintiff in *Griffin*, Contreras in this case is challenging the accommodations policy of Suncast as a *per se* violation of the ADA, which as the Tenth Circuit properly notes, is intended only to protect qualified persons with disabilities.

In *Roe*, an employee sued her employer alleging that her employer's policy of requiring employees to report their use of prescription drugs and to submit to random drug tests violated the provisions of the ADA prohibiting an employer from requiring a medical examination or inquiring about an

employee's disability unless such examination or inquiry is job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A). Similar to the court in *Griffin*, the Tenth Circuit in *Roe* found that this provision "applies to all employees" and is therefore dissimilar from a policy related to providing reasonable accommodations. 124 F.3d 1229. The Tenth Circuit held:

> This provision [42 U.S.C. § 12112(d)(4)(A)] applies to all employees. Unlike suits based on a failure to provide a reasonable accommodation, this provision is not limited to qualified individuals with disabilities.

124 F.3d at 1229. Thus, the decisions of *Griffin* and *Roe* are clearly distinguishable from Contreras' challenge to Suncast's accommodations policy in this case. The holdings of both *Griffin* and *Roe* are entirely consistent with the Seventh Circuit in this case. Because there is no conflict in the Circuits, consideration of this case by this Court is not necessary.

C. The Seventh Circuit Did Not Deprive Contreras His Due Process Rights by Finding as a Matter of Law That He Was Not Meeting the Legitimate Expectations of His Employer

Contreras argues that the Seventh Circuit, by affirming Judge Williams' finding that Contreras failed to make a *prima facie* claim for national origin discrimination because he was not meeting Suncast's legitimate expectations, deprived Contreras of his due process because such a finding "stripped Contreras of his wrongful discharge claim." (Pet. 12). In essence, Contreras is arguing that any decision by an

appellate court that has preclusive effect on another claim violates that party's due process rights. Such an argument is ridiculous.

Contreras appealed Judge Williams' grant of summary judgment to the Seventh Circuit. In analyzing Contreras' national origin claim, the Seventh Circuit necessarily had to analyze whether Contreras was able to make out a *prima facie* case of national origin discrimination. In so doing, the Seventh Circuit had to address whether Contreras was meeting Suncast's legitimate expectations under the well-settled burden shifting method outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The Seventh Circuit fully and fairly considered the arguments of the parties as well as the decision of the district court on the issue of whether Contreras was meeting Suncast's legitimate expectations. The Seventh Circuit, however, disagreed with Contreras' position and held that he was not meeting Suncast's expectations. The mere fact that the Seventh Circuit's decision might have an adverse preclusive effect on Contreras' wrongful discharge claim, in no way suggests that Contreras was denied due process. Indeed, Contreras cites no legal authority for his novel argument.

D. Judge Williams' Judgment Was Not Void

Contreras argues for the first time in his Petition for Certiorari that Judge Williams' entry of summary judgment in favor of Suncast was void because she did not have authority to enter her summary judgment order since the case had been reassigned to Judge Conlon. (Pet. 12). In the Seventh Circuit, Contreras did not challenge Judge Williams'

authority to enter summary judgment, but rather argued that it was Judge Conlon who entered a void order in granting costs in favor of Suncast. (Pet. App. 22a).

As an initial matter, this Court need not consider Contreras' newly-crafted argument raised for the first time in this Court. *See, e.g., California v. Taylor*, 353 U.S. 553, 557, n.2 (1957). Nevertheless, Contreras' argument is wrong. On November 17, 1999, the Honorable Richard A. Posner, Chief Judge of the United States Court of Appeals for the Seventh Circuit, designated and assigned Judge Williams "to hold a district court in the Northern District of Illinois in the [Seventh] Circuit, during the period beginning November 17, 1999, and ending December 31, 2000, and for such additional time thereafter as may be required to complete unfinished business." (Res. App. at 1a). This designation clearly and unequivocally granted Judge Williams authority to enter summary judgment in favor of Suncast on March 15, 2000.

Thus, Judge William had authority to enter summary judgment in this case and the parties were fully aware prior to her ruling that she planned on ruling on the pending motions. Judge Williams was an impartial Article III judge and accordingly Contreras has no basis to challenge her entry of summary judgment. (See Pet. App. 22a).

E. Contreras' New Chart Allegedly Showing Disparity in Discipline for Work Rule Violations Should Be Rejected

Contreras presents for the first time to this Court a newly-created chart attempting to reveal that Contreras was treated more harshly than other employees. (Pet. App. 70a-72a). With the exception of Randy Guillotte, Contreras failed to

assert in the lower courts that these individuals were similarly situated comparable employees who were treated better than he. (Pet. App. 40a-43a.) This new evidence and these new comparables which Contreras raises for the first time in this Court should be rejected by this Court. *See, e.g., California v. Taylor*, 353 U.S. 553, 557, n.2 (1957).

Even if this Court were to consider this chart, the chart in no way suggests that Contreras was discriminated against based on his national origin. First, of the seven individuals identified on the chart, four are Mexican-American[5]. To the extent that these individuals were treated more favorably than Contreras tends to disprove Contreras' assertion that he was discriminated against based on his national origin. Second, there is no indication by the chart as to whether these individuals are in fact similarly situated. Indeed, Randy Guillotte is not similarly situated as he was Contreras' supervisor and not a member of the bargaining unit. (Pet. App. 41a). Moreover, none of the individuals listed in the chart had as poor of an overall attendance and disciplinary record as Contreras. Thus, the chart proves nothing.

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5. Lorenze Enrique, Art Munoz, Jose Salgado and Marco Aguilar are Mexican-American.

CONCLUSION

No important issue or conflict among the circuits is presented by this case which makes resolution by this Court appropriate. Rather, this case involves a routine application of well-settled principles of employment discrimination law and nothing more. For all of these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — AO FORM 25D (REV. 6/83) DESIGNATION OF CIRCUIT JUDGE FOR SERVICE IN A DISTRICT COURT WITHIN HIS CIRCUIT DATED NOVEMBER 17, 1999

DESIGNATION OF CIRCUIT JUDGE FOR SERVICE IN A DISTRICT COURT WITHIN HIS CIRCUIT

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the authority vested in me by Title 28, United States Code, Section 291(b), I do hereby designate and assign the Honorable Ann C. Williams United States Circuit Judge for the Seventh Circuit to hold a district court in the Northern District of Illinois in the said circuit, during the period beginning November 17, 1999, and ending December 31, 2000, and for such additional time thereafter as may be required to complete unfinished business.

s/ Richard A. Posner
Richard A. Posner, Chief Judge

Dated November 17, 1999 Seventh Circuit